STATE OF MICHIGAN

COURT OF APPEALS

SOLIS FRIZZELL,

Plaintiff-Appellant,

v

QUALITY FUEL GAS STATION and SAM ELAKKARI,

Defendants-Appellants,

and

KAMAL,

Defendant.

UNPUBLISHED
August 5, 2014

No. 314812
Macomb Circuit Court
LC No. 2012-001705-NO

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Solis Frizzell, appeals as of right an order, which dismissed her claims against defendants Quality Fuel Gas Station, Sam Elakkari, and "Kamal" without prejudice and required her attorneys, Randy Calvin and Joel A. Bernier, to pay $3,200 to Elakkari for attorney fees and costs of the "frivolous" action. We affirm.

I

Plaintiff filed a complaint against Quality Fuel Gas Station (located at 186 Northbound Gratiot Avenue), Elakkari (the alleged owner of Quality Fuel Gas Station), and "Kamal" (an alleged employee of Quality Fuel Gas Station). Plaintiff maintained that an employee, known to her only as "Kamal," swung a piece of lumber at an unidentified customer at the gas station and struck plaintiff. Plaintiff alleged that, as a result, she suffered injuries. Plaintiff alleged assault and battery against Kamal. Plaintiff alleged "premises liability/respondeat superior" against Quality Fuel Gas Station—claiming it was liable for the torts of its employees. No allegations were made against Elakkari. A proof of service demonstrates that Ammar Dalou received the complaint on behalf of Quality Fuel Gas Station, but there is no proof of service in the record for Elakkari or Kamal.

In the affirmative defenses to defendants' answer and a subsequent motion for summary disposition, defendants maintained, *inter alia*, "there is no legal entity known as Quality Fuel

Gas Station"[1] and improper service of process. In addition, in the motion for summary disposition, Elakkari argued plaintiff's attorneys acted in bad faith because plaintiff agreed to dismiss the case if Elakkari provided "Kamal's" last name, and then refused to stipulate to the dismissal after receiving that information. Elakkari further argued plaintiff should be ordered to pay costs and fees because the action was frivolous.[2]

Plaintiff, including attorney Calvin, did not appear at the August 28, 2012 status conference. Consequently, the trial court scheduled a hearing for plaintiff to show cause why the case should not be dismissed for the failure of Calvin to appear.

At the show cause hearing, Calvin again failed to appear. Instead, co-counsel Bernier argued that Calvin was late to the September 28 status conference due to traffic, and did not have the phone number to contact the court about the delay. Defendants' attorney disputed the time Bernier claimed that Calvin finally arrived on September 28, and Bernier replied, "Well, Judge, I can only go by what my co-counsel tells me." The trial court stated that Calvin should have appeared at the show cause hearing to explain "what he did and didn't do. It just shows another lack of respect for this court. He did not appear on time." The trial court dismissed the case for the failure to appear, and the subsequent failure to appear or provide a satisfactory reason for the failure.

At the same hearing, the trial court ruled the summary disposition motion[3] was an alternative basis for dismissal because Quality Fuel Gas Station did not exist and no claims were made against Elakkari. The trial court ruled the suit against Quality Fuel Gas Station was frivolous because plaintiff did not conduct an appropriate investigation of the entity's name before filing. Although Calvin drove past 196 North Gratiot and claimed he saw a sign that said "Quality Fuel Gas Station," defendants maintained that the sign merely read, "quality fuel sold here." The trial court found that neither the sign referencing quality fuel nor a police report in the record, which involved the gas station, authoritatively established the entity's legal name, and

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[1] Elakkari, the owner of the gas station at 186 North Gratiot, averred that "Quality Fuel Gas Station" was not the entity's name and both parties agree there is no record of "Quality Fuel Gas Station" on the State of Michigan's licensing website.

[2] In a supplemental brief regarding attorney fees, Elakkari's attorneys (Mel R. Partovich and John E. McCarthy) argued that $250 was the reasonable hourly rate charged for the legal services they provided, given their professional experience, the location and size of their firm, and their specialty. The attorneys submitted a 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report to support their argument. The attorneys also submitted an accounting of their services totaling 12.8 hours.

[3] Bernier requested that consideration of the motion for summary disposition be delayed until he had had 21 days to respond, claiming that he had only received the motion on September 7, 2012, even though it was e-filed on August 7, 2012. The record includes an affidavit from the Macomb County Clerk, who reviewed the e-filing records from August 7, 2012, and averred that the e-service fee was not paid for the motion for summary disposition and accompanying brief and neither the e-filing system nor the court delivered the motion and brief to plaintiff.

discovering it would have been "as simple as" entering the gas station to see its business license posted under MCL 445.373, viewing its tax records, or contacting the state of Michigan. Therefore, the trial court found costs and attorney fees were appropriate. Following a motion for reconsideration, the trial court ruled dismissal also could have been appropriate under MCR 2.116(C)(3) because Elakkari and Kamal were not served properly.

The trial court subsequently entered an order dismissing the entire case without prejudice pursuant to its show cause order. The trial court also dismissed the claims against Elakkari and Quality Fuel Gas Station without prejudice under MCR 2.116(C)(3) and (8).[4] The trial court ordered plaintiff's attorneys to pay $3,200 of costs and attorney fees to Elakkari. Plaintiff moved to set aside the trial court's order, but the motion was denied and, in its order, the trial court concluded that the order for 12.8 hours of attorney fees was supported by the docket entries and the "time the Court has spent on this matter."

II

On appeal, plaintiff argues the trial court abused its discretion when it dismissed her case for the failure to appear and the subsequent failure to appear at the show cause hearing or to provide a satisfactory reason for the initial failure to appear. We disagree. This Court reviews a trial court's decision to order default as a sanction for a party's failure to comply with a court order for an abuse of discretion. See *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). A trial court abuses its discretion when it reaches a decision that falls outside of the range of principled outcomes. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010).

MCR 2.504(B)(1) provides, "If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." Calvin not only missed the August 28, 2012 hearing, but he failed to appear at the show cause hearing to explain his actions. The trial court found its docket was inconvenienced, and defendants were prejudiced as well because they had expected to settle the case at the status conference. Instead, they incurred more attorney fees to defend the action at subsequent proceedings. Although dismissal is "a drastic step that should be taken cautiously," *Vicencio*, 211 Mich App at 506, the trial court dismissed the case without prejudice and plaintiff had the opportunity to refile. See *Thomas v MESC*, 154 Mich App 736, 742; 398 NW2d 514 (1986), quoting 46 Am Jur 2d, Judgments, § 484, pp 646-647 ('"The inclusion of the term 'without prejudice' in a judgment of dismissal ordinarily indicates the absence of a decision on the merits, and leaves the parties free to litigate the matter in a subsequent action, as though the dismissed action had not been

[4] There is no explanation in the record for the inconsistency between the trial court's oral ruling that summary disposition under MCR 2.116(C)(3) was an alternative ground for dismissal of the claims against Kamal and the written order that makes no reference to dismissal of the case against Kamal under MCR 2.116(C)(3).

commenced."'). Plaintiff has not demonstrated that the trial court's dismissal without prejudice fell outside of the range of principled outcomes. *Keinz*, 290 Mich App at 141.[5]

III

Next, plaintiff argues the trial court abused its discretion by determining that the action was frivolous and awarding $3,200 in costs and attorney fees to Elakkari. We disagree. This Court reviews for an abuse of discretion a trial court's award of fees, *Id.*, but we review a trial court's determination that an action is frivolous for clear error. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and clear conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

When the trial court finds that a civil action is frivolous, it must award to the prevailing party "costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(1); see also MCR 2.114(F); MCR 2.625(A)(1). The amount awarded "shall include all reasonable costs actually incurred by the prevailing party . . . including court costs and reasonable attorney fees." MCL 600.2591(2).[6] Under MCL 600.2591(3)(a), an action is frivolous if any of the following conditions are met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

The frivolous claims provisions impose an affirmative duty on each attorney "to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The reasonableness of the inquiry is determined by an objective standard." *Id.* The focus is on the

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[5] In light of this conclusion, we decline to address plaintiff's arguments on appeal regarding the trial court's alternative basis for dismissal under MCR 2.116(C), including whether plaintiff was entitled to additional time to respond before the hearing. But even if we addressed these arguments, any error involving the service of the motion and plaintiff's response time was harmless and plaintiff could not establish that a question of fact existed regarding whether Quality Fuel Gas Station was the legal entity operating at 186 North Gratiot.

[6] When determining if an action was frivolous, the trial court's decision must be on the basis of the circumstances as they existed when the action was filed. *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008).

efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. *Id*.

Contrary to plaintiff's claim on appeal, there is no indication in the record that the trial court found the action to be frivolous based on plaintiff's legal position, including respondeat superior. MCL 600.2591(3)(a)(iii). Rather, the trial court's findings appear to be based on MCL 600.2591(3)(a)(ii)—the facts underlying plaintiff's legal position were not true. The trial court concluded that plaintiff's attorneys failed to conduct the necessary pre-suit investigation regarding the name of the gas station at 186 Northbound Gratiot Avenue—they merely observed a sign that quality fuel is "sold here" and reviewed a police report involving the entity when "simple" measures could have been taken to discover the gas station's legal name, including reviewing the business license or tax records or contacting the state. Given this failure to investigate the gas station's legal name, along with additional failures to make allegations against Elakkari, the improper service of Elakkari and Kamal, and the failure to identify Kamal's full name, we are not left with a definite and clear conviction that a mistake was made when the trial court found the action was frivolous. *Guerrero*, 280 Mich App at 677.

Plaintiff also claims that the trial court's award of attorney fees was an abuse of discretion because there was no itemized invoice to demonstrate if the fees charged were reasonable based on the work performed. See *Smith v Khouri*, 481 Mich 519, 532; 751 NW2d 472 (2008) ("The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness."). An itemized list of services provided by their attorneys from July 23, 2012, to August 28, 2012 (12.8 hours) was attached as Exhibit A to the supplemental brief filed on September 7, 2012. The services included reviewing the complaint and discovery requests, consulting Elakkari, contacting plaintiff's counsel, conducting legal research, preparing documents (the answer and motion for summary disposition), and attending the August 28, 2012 status conference. Plaintiff's claim is inconsistent with the record, and therefore, fails to establish any abuse of discretion.

IV

In summary, the trial court did not abuse its discretion when it dismissed plaintiff's case without prejudice. Moreover, the trial court did not clearly err when it found the action was frivolous and plaintiff has failed to demonstrate any error in the substantiation of the claim for 12.8 hours of attorney fees. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly